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**IN THE
COURT OF APPEALS OF INDIANA**

JAY MESSER,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A05-0603-PC-153

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Jane Magnus Stinson, Judge
The Honorable Jeffrey L. Marchal, Commissioner
Cause No. 49G06-0002-PC-30939

April 4, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Petitioner, Jay Messer (Messer), appeals the post-conviction court's denial of his Petition for Post-Conviction Relief.

We affirm.

ISSUE

Messer raises one issue on appeal, which we restate as follows: Whether he received ineffective assistance of trial counsel.

FACTS AND PROCEDURAL HISTORY

We adopt the statement of facts as set forth in *Messer v. State*, No. 49A02-0106-CR-417, slip. op. (Ind. Ct. App. June 6, 2002):

The facts most favorable to the judgment reveal that on February 20, 2000, James Clingerman was in his car at a stoplight when another car pulled up on his left side. Messer, a passenger in the other car that was driven by Whitney Keesling, motioned to Clingerman. Clingerman looked over and saw Messer "flip him off." Appendix p. 15. Messer began yelling at Clingerman and asked him if he was a "hard-ass." Appendix p. 17. Clingerman shook his head and tried not to pay attention to him. Keesling motioned for Clingerman to pay no attention to Messer.

Keesling pulled the car forward, but Messer ordered her to back up. Messer pulled a gun from his right side, rolled down the window about three or four inches, raised the gun to the opening in the window, and asked Clingerman if he was afraid of the gun. Messer then rolled his window all the way down and fired the gun, shooting Clingerman in the head. Clingerman suffered permanent blindness in his left eye, a plate in his jaw, and numbness on the left side of his face.

After the incident, Keesling drove off and returned to the apartment she shared with Messer. After Messer made at least one phone call, Keesling took Messer to a restaurant where he used to work. While there, Messer showed some people his gun and told the waitress that he was going to prison. The bartender called the police, who arrested him. In the

meantime, Keesling went to a friend's house, where she phoned the police nearly three hours after the shooting.

(slip op. pp. 2-3).

On February 22, 2000, the State filed an Information charging Messer with Count I, attempted murder, a Class A felony, Ind. Code § 35-42-1-1; Count II, aggravated battery, a Class B felony, I.C. § 35-42-2-1.5; Count III, possession of a handgun with obliterated serial number, a Class C felony, I.C. §35-47-2-18; and Count IV, carrying a handgun without a license, a Class A misdemeanor, I.C. § 35-47-2-1. On April 24, 2001, a jury found Messer guilty as charged. Thereafter, on May 23, 2001, the trial court sentenced him to an aggregate sentence of fifty-four years imprisonment on Counts I and III. We affirmed Messer's conviction and sentence on direct appeal.

Consequently, on August 12, 2003, Messer filed a Petition for Post-Conviction Relief, which was amended on November 19, 2003. On February 22, 2006, after a bifurcated hearing, the trial court issued its findings of fact and conclusions of law denying Messer relief.

Messer now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. Post-Conviction Relief Standard of Review

Under the rules of post-conviction relief, the petitioner must establish the grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1, § 5; *Barker v. State*, 622 N.E.2d 1336, 1337 (Ind. Ct. App. 1993), *trans. denied*. To succeed on appeal from the denial of relief, the post-conviction petitioner must show that the

evidence is without conflict and leads unerringly and unmistakably to a conclusion opposite to the one reached by the post-conviction court. *Spranger v. State*, 650 N.E.2d 1117, 1119 (Ind. 1995), *reh'g denied*. The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. *Woods v. State*, 701 N.E.2d 1208, 1210 (Ind. 1998), *reh'g denied*.

The purpose of post-conviction relief is not to provide a substitute for direct appeal, but to provide a means for raising issues not known or available to the defendant at the time of the original appeal. *McBride v. State*, 595 N.E.2d 260, 262 (Ind. Ct. App. 1992), *trans denied*. If an issue was available on direct appeal but not litigated, it is waived. *Id.*

II. *Ineffective Assistance of Counsel*

Messer argues that he received ineffective assistance of trial counsel. The standard by which we review claims of ineffective assistance of counsel is well established. In order to prevail on a claim of this nature, a defendant must satisfy a two-pronged test: (1) a showing that his counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms, and (2) a showing that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Troutman v. State*, 730 N.E.2d 149, 154 (Ind. 2000) (citing *Strickland v. Washington*, 466 U.S. 668 (1984), *reh'g. denied*).

We do not need to determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. *Strickland*, 466 U.S. at 697. However, counsel's performance is presumed effective, and

a defendant must offer strong and convincing evidence to overcome this presumption. *Saylor v. State*, 765 N.E.2d 535, 549 (Ind. 2002). Consequently, isolated poor strategy or bad tactics do not necessarily amount to ineffective assistance of counsel unless, taken as a whole, the defense was inadequate. *Brown v. State*, 698 N.E.2d 1132, 1139 (Ind. 1998), *reh'g denied*. Furthermore, we “will not speculate as to what may or may not have been advantageous trial strategy as counsel should be given deference in choosing a trial strategy which, at the time and under the circumstances, seems best.” *Whitener v. State*, 696 N.E.2d 40, 42 (Ind. 1998).

Here, Messer presents us with a myriad of perceived defects in his trial counsel’s evaluation and presentation of the evidence. In fact, trial counsel testified during Messer’s post-conviction hearing as a witness for his client. By counsel’s own admission, Messer’s trial took place during a very difficult phase in his life. His father has recently been diagnosed with cancer and at the evening before trial, trial counsel just returned home from a visit with his parent. Candidly, trial counsel stated that “I didn’t have a very good attitude during trial. My thoughts were elsewhere.” (Transcript p. 183). Reminiscing about his trial performance, he elaborated that

It was clearly below par for me. From a defense perspective, your demeanor, your zeal in front of the jury is very important. Sometimes trials are won simply and totally contrary to the evidence based, only on the defense attorney’s demeanor. I think you can mechanically do a good trial but if your demeanor, your zeal are not there, it’s not good for the defendant.

(Tr. p. 200). He felt that Messer “did not get a fair shake and that [his] performance played into that” (Tr. p. 193). Based on trial counsel’s unequivocal statements, we will give careful scrutiny to the evidence before us.

Before turning to Messer’s individualized allegations of ineffective assistance, we first note that trial counsel’s trial preparation included conducting meetings with family members and Messer before trial, taking taped statements of witnesses and other discovery, filing motions in limine, formulating a theory of defense, presenting a cogent opening argument, cross-examining the State’s witnesses, raising objections, presenting closing arguments and presenting witnesses at Messer’s sentencing hearing.

A. Trial Counsel’s Theory of Defense at Trial

Messer’s main contention relates to trial counsel’s theory of defense. Specifically, he asserts that by raising the defense of accident, trial counsel presented an invalid theory unsupported by any facts or legal basis. In support, Messer refers to the post-conviction hearing where trial counsel testified that he believed “the theory of defense [to be] accident, something of that nature.” (PCR Transcript p. 183)¹. However, counsel’s statement is followed by the elaboration “[t]here is no disputing that [Messer] discharged the gun. The real question was intent.” (PCR Tr. p. 183).

Our review of the trial court’s record indicates that Messer mischaracterizes his counsel’s theory of defense. In fact, during opening statement, trial counsel informed the jury that their “big question [] is to decide what [Messer] was really intending to do that

¹ PCR Transcript or PCR Tr. refers to the proceedings on post-conviction relief; while, Transcript or TR refers to the proceedings before the trial court.

evening.” (Tr. p. 139). Because the State raised questions regarding defense counsel’s opening statement, a hearing outside the purview of the jury was held, affording counsel an opportunity to explain his theory of defense. During this exchange, Messer’s counsel unequivocally asserted that “I’m not arguing diminished capacity. I’m arguing that he did not intend to pull the trigger.” (Tr. p. 141).

In light of the evidence presented at trial, we conclude that a theory of lack of intent was a viable and proper defense. As all parties agreed that Messer fired the gun, the only possible strategy to undermine the State’s case was to focus on the level of Messer’s culpability. By claiming that Messer did not have the actual intent to fire the gun, counsel requested the jury to find Messer not guilty of attempted murder or aggravated battery. Therefore, defense counsel presented evidence that even though Messer was waving the gun around prior to discharging it, Keesling never saw him actually point and aim the gun. Keesling further informed the jury that Messer was intoxicated and that she believed the shooting to be an accident.

Nevertheless, the jury also heard evidence from which it could conclude that Messer was guilty of the crime charged. The State presented testimony that Messer provoked the incident with Clingerman. Even when Keesling attempted to diffuse the situation, Messer ordered her to back up the car, rolled down his window and shot Clingerman. After the shooting, Messer picked up the shell casing and placed it in his pocket. Furthermore, the State presented evidence from its firearms expert establishing that it would take a “conscience effort to pull the trigger.” (Tr. p. 116). In light of the facts presented at trial, we find that Messer’s counsel cogently framed his defense of lack

of intent. Therefore, we conclude that Messer did not show deficient performance in defense counsel's presentation of a theory of defense. *See Troutman*, 730 N.E.2d at 154.

B. *Voluntariness Defense*

Next, Messer argues that because defense counsel should have been aware of the shortcomings of his presented defense theory, he should have researched and pursued alternative theories of defense. Messer maintains that counsel should have focused on "voluntariness" based on Messer's level of intoxication at the time of the shooting. Thus, Messer contends that trial counsel's performance was defective for failure to raise an additional level of defense.

Initially, we agree with the post-conviction court that given the facts of this case, very few defenses were available to Messer. The most viable defense—lack of requisite intent—was effectively pursued by counsel at trial. In his brief, Messer now appears to assert that Messer did not act voluntarily when he shot Clingerman in an intoxicated condition. This argument must fail. I.C. § 35-41-3-5 clearly stipulates that

It is a defense that the person who engaged in the prohibited conduct did so while he was intoxicated, only if the intoxication resulted from the introduction of a substance into his body:

- (1) without his consent; or
- (2) when he did not know that the substance might cause intoxication.

Here, the record is completely devoid of any evidence supporting a claim that Messer became intoxicated without his consent. Rather, testimony clearly establishes that Messer spent a considerable amount of time at a bar prior to the incident. In light of this

evidence and his known history of alcohol abuse, it is reasonable to conclude that Messer was fully aware and familiar with the intoxicating qualities of alcohol.

Additionally, Messer focuses on the extensive expert testimony by Dr. George Parker (Dr. Parker), a forensic psychiatrist. Dr. Parker had three interview sessions with Messer in April and December of 2004 and, in addition, examined Messer's medical history and records. Dr. Parker concluded that "the condition that [Messer] was in at the time" of the incident, would have interfered with his "ability to form a specific intent." (PCR Tr. p. 143). Based on this statement, Messer maintains that his automatic state of mind precluded voluntary behavior. In support, he refers us to *McClain v. State*, 678 N.E.2d 104 (Ind. 1997), *reh'g denied*, where our supreme court defined automatism as "the existence in any person of behavior of which he is unaware and over which he has no conscious control" and held that "evidence of automatism can be presented to show lack of criminal intent." *Id.* at 106.

Even though Messer discusses *McClain* and its progeny at length, in light of the State's overwhelming evidence that Messer actively interacted with Clingerman, "flipping him off," yelling at him and asking him questions, we do not find that there is a reasonable probability that, even if evidence of automatism was introduced, the result of the proceeding would have been different. (Tr. p. 17). Accordingly, we conclude that Messer's counsel was not deficient in failing to raise voluntariness as a defense. *See Troutman*, 730 N.E.2d at 154.

C. Mental Disease or Defect Defense

Thirdly, Messer treats us to a lengthy discourse contending that his counsel was defective for failing to advance a theory of mental disease or defect relieving Messer of responsibility for his actions. Indiana Code section 35-41-3-6 defines mental disease or defect as follows:

(a) A person is not responsible for having engaged in prohibited conduct if, as a result of mental disease or defect, he was unable to appreciate the wrongfulness of the conduct at the time of the offense.

(b) As used in this section, “mental disease or defect” means a severely abnormal mental condition that grossly and demonstrably impairs a person’s perception, but the term does not include an abnormality manifested only by repeated unlawful or antisocial conduct.

In support of his argument, Messer focuses on the testimony of Dr. Parker who stated at the post-conviction hearing, that at the time of the crime Messer suffered from panic disorder, alcohol dependence, cannabis dependence, was abusing other drugs, and was probably depressed, as shown by his suicidal ideation. Although Dr. Parker explained that Messer’s thought process and judgment was grossly impaired due to alcohol, he never offered the opinion that Messer was unable to appreciate the wrongfulness of his conduct as contemplated under I.C. § 35-41-3-6.

Moreover, the State offered significant evidence tending to show that Messer did appreciate the wrongfulness of his conduct. After the shooting, Messer picked up the shell casing and placed it in his shirt pocket. He later displayed the gun to a former co-worker, stating that he was going to prison and that he “just can’t make it there.” (Tr. p. 85). Accordingly, we conclude that Messer has not shown that there is a reasonable

probability that, but for counsel's decision not to argue mental disease, the trial outcome would have been different. *See Troutman*, 730 N.E.2d at 154.

D. *Other Acts and Omissions*

Here, Messer asserts a multitude of minor errors and deficiencies on the part of his defense counsel. We will discuss each in turn.

1. *Request of Continuance*

Messer claims that his counsel was deficient for failing to request a continuance following the trial court's ruling that defense counsel could not present mental health evidence. Our review of the trial court's hearing reflects that counsel insisted on presenting this evidence to show that Messer's main intent for purchasing the gun was to kill himself, and additionally to show that he was under medication, which would sometimes lead to alcohol abuse. Because this evidence would go towards diminished capacity, the trial court prohibited all references to it. Instead of seeking a continuance, trial counsel proceeded with trial.

"The decision not to seek a continuance is the kind of a strategic choice that is within the province of counsel, as would have been a decision by counsel to seek a continuance under these circumstances." *Miller v. State*, 702 N.E.2d 1053, 1060 (Ind. 1998), *reh'g denied*. Here, we conclude that Messer has not carried his burden of demonstrating deficient performance or prejudice with respect to counsel's failure to request a continuance. *See Troutman*, 730 N.E.2d at 154.

2. Counsel's Misstatement of Law

Messer argues that during voir dire defense counsel misstated the law by indicating that the jury is the finder of fact and the judge is the finder of law. Messer maintains that this statement was in violation of Article 1, Section 19 of the Indiana Constitution which defines that a jury in a criminal trial has the right to determine both the law and the facts.

However, the record indicates that both in preliminary and final instructions, the jury was instructed that:

Under the Constitution of Indiana, the jury is given the right to decide both the law and the facts. In fulfilling this duty, you are to apply the law as you actually find it, and you are not to disregard it for any reason. The instructions of the [c]ourt are your best source in determining what the law is.

(Tr. pp. 127, 159). In light of this curative instruction, we find that Messer failed to demonstrate any error that would have changed the outcome at trial. *See Troutman*, 730 N.E.2d at 154.

3. State's Closing Argument

Next, Messer contends that his counsel was defective for failing to object to the State's closing argument which referenced facts not in evidence and included inflammatory hyperbole. However, it is well established that silence is a reasonable strategic choice as it would avoid focusing the jury's attention on the State's statements. As we stated before, strategic decisions do not amount to ineffective assistance of counsel. *See Potter v. State*, 684 N.E.2d 1127, 1133 (Ind. 1997) ("A reviewing court must grant the trial attorney significant deference in choosing a strategy which, at the

time and under the circumstances, he or she deems best.”); *Smith v. State*, 689 N.E.2d 1238, 1244 (Ind. 1997) (“Tactical choices by trial counsel do not establish ineffective assistance of counsel even though such choices may be subject to criticism or the choice ultimately proves detrimental to the defendant.”).

4. *Trial Court’s Comments*

Turning his focus to the trial court’s comments, Messer maintains that the trial court frequently demeaned defense counsel in front of the jury. Even though Messer argues that the effect of the trial court’s comments resulted in counsel “looking beside himself,” Messer fails to suggest what remedy defense counsel should have employed. (PCR Tr. p. 237). However, we note that the trial court’s comments were mostly in response to the State’s objections to remarks made by defense counsel at trial. As we stated above, the failure to object is a strategic decision which does not amount to ineffective assistance of counsel. *See id.*

5. *Cumulative Error*

Messer claims that the subsequent errors by his counsel cumulatively result in ineffective assistance. We agree with the State that in the instant case, Messer’s assertions of error were in fact reasonable strategic decisions on the part of Messer’s defense counsel. Accordingly, taken together they do not amount to cumulative error.

E. *Counsel’s Performance at Sentencing*

Contesting trial counsel’s performance at sentencing, Messer claims that defense counsel failed to thoroughly investigate all possible mitigating factors. We disagree. During the sentencing hearing, counsel presented testimony from Messer’s father,

stepmother, girlfriend, and Messer himself. Messer's father stated that his son had been diagnosed as having anxiety, panic attacks, and depression. Defense counsel argued in closing that his client had a significant mental and emotional problem which led him to purchase the gun. Additionally, he testified that on the night of the crime, Messer had mixed drugs and alcohol up to the point of amnesia.

During the post-conviction hearing, the judge presiding over the trial and sentencing hearing indicated that although he would have allowed Messer to introduce more evidence regarding his mental status, it would not have altered the sentence he imposed. The trial judge also clarified that he did not consider Messer's prior conviction for intimidation when determining his sentence.

In light of the evidence before us, we conclude that defense counsel acted reasonably and thorough during the sentencing stage of Messer's trial. Therefore, we do not find counsel's performance to be ineffective. *See Troutman*, 730 N.E.2d at 154.

F. *Prejudice*

In his final argument, Messer reiterates the post-conviction court's detailed findings of fact and conclusions of law, and contends that even though the post-conviction court found that counsel's performance was adequate, it did not reach the prejudice prong under *Strickland*.

Nevertheless, as we stated in our standard of review, in order to prevail on a claim of ineffective assistance of counsel, a defendant must satisfy a two-pronged test: (1) a showing that his counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms, and (2) a showing that there is a

reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Troutman v. State*, 730 N.E.2d 149, 154 (Ind. 2000) (citing *Strickland v. Washington*, 466 U.S. 668 (1984), *reh'g. denied*). Because both prongs need to be satisfied for a successful claim of ineffective assistance of counsel, the post-conviction court's finding that trial counsel's performance was reasonable under the circumstances eliminates the need to conduct a review under the prejudice prong. Accordingly, the post-conviction court's denial of Messer's petition for post-conviction relief was proper.

In sum, even though defense counsel's admissions during the post-conviction hearing proved troublesome, we do not find that his personal concerns interfered with his ability to adequately represent Messer. We agree with the post-conviction court's finding that counsel's performance showed no sign of complacency, disinterest, or lack of effort. Even though counsel now claims that in hindsight he should have done some things differently, we recognize that the perfect trial or trial performance does not exist. However, in the scheme of things and the situation at hand, Messer's counsel was diligent in his trial preparation, his conduct at trial, and in the presentation of evidence during sentencing. Thus, even if counsel believes that his performance was less than his best, the record does not support any ineffectiveness.

CONCLUSION

Based on the foregoing, we conclude that Messer failed to demonstrate that he received ineffective assistance of trial counsel. Therefore, his Petition for Post-Conviction Relief was properly denied.

Affirmed.

KIRSCH, J., and FRIEDLANDER, J., concur.